No. 517

OCT 18 19

JOHN T. FEY, C

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of F. P. NEWPORT CORPORATION, LTD., et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
Attorney at Law
215 W. Seventh Street
Los Angeles, California
TRinity 3241
Attorney for Petitioner.

TOPICAL INDEX

	Page
Jurisdiction	2
Opinion Below (233 Fed. (2) 1944)	2
Statutes Involved	3
Statement of the Case	5
Questions Presented by This Appeal	13
Reasons for Granting the Writ:	15
(1) Several important questions had been decided contrary to *Erie v. Tompkins*, 304 U. S. 64 and Section 1652 Title 28 U. S. Code.	
(2) The decision is contrary to equitable principles decided by this court.	
(3) This court should exercise its supervisory jurisdiction over appeal.	
Argument	15
I. An order rendered by a District Judge and the interpretation of his own order should be heard only by the judge who made the order, if available	15
II. An order made by a District Court Judge and never revoked continues on under its own terms until it is revoked. The sums due under Judge McCormick's order are due and payable to Mr. Newport	19
III. The voluntary benefits accepted by the F. P. Newport estate are such that Newport should be compensated in equity for the preservation and benefits to the entire fund under well known equitable principles	22

Page

Mr. Newport is entitled further to extraordinary fees for services rendered in preserving the whole estate 22

IV. The referee erred in refusing to receive evidence from Mr. Newport and denying the offers of proof made of all of the services and work performed by Mr. Newport 28

Appendix—Opinion ..... App. 1

TABLE OF CASES AND AUTHORITIES CITED

Cases

Central R.R. etc. Co. v. Pettus, 113 U. S. 116, 127 ..... 20, 25

Chapin v. Collard, 189 P. 2d 642 27

Colley v. Wolcott, 187 F. 595 25

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 495, 38 L. Ed. 493 at 498 27

Defense Supply Corporation v. Lawrence Warehouse Co., 326 U. S. 631, 93 L. Ed. 931 ..... 15, 16

Dodd v. Stellar, 30 Cal. 2d 506 24

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 ..... 13, 27, 30, 31

Ellis v. Atlantic Refining Co., 308 Pa. 237; 163 A. 531, 83 A.L.R. 936 25

Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608 26

Faust v. Faust, 103 Cal. App. 2d 755 16

Hardware Mut. Casualty Co. v. Butler, 116 Mont. 73, 148 P. 2d 563 25

Page
Harris, Appeal of, 323 Pa. 124, 186 A. 92, 96 25
Ide v. Crosby, 104 Fed. 582 17
Imperial Assurance Co. v. Livingston, 8 Cir., 49 F. 2d 745, 74 A.L.R. 1336 29
Klein v. Fleetford, 35 Fed. 98 18
Los Angeles Times Mirror Company v. Superior Court, 3 Cal. 2d 309 30
Lustron Corporation, Re, 196 Fed. 2d 975 27
Marre, Estate of, 18 Cal. 2d 191 25
Muskegon Boiler Workers v. Tennessee Valley I. & R. Co., 274 F. 386 25
Newport v. Sampsell, 233 Fed. (2) 944 2
R. E. Spriggs Inc. v. Industrial Accident Commission, 42 Cal. 2d 785, p. 793 25
Sprague v. Ticonic National Bank, 307 U. S. 161, 83 L. Ed. 1184 ..... 21, 25, 27
Scott v. Superior Court, 208 Cal. 303 25
Trustees Internal Improvement Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 ..... 21, 25
Vangel v. Vangel, 45 A.C. No. 24, p. 828 ..... 22, 24
Vaught v. Charleston National Bank, 62 Fed. 2d 817 at 820 25
Westerly Water Works v. Town of Westerly, 77 Fed. 783, 785 17
Wiegand, In re, 27 Fed. Supp. 725, 729 16
Wilson v. Pittsburgh B. & I., 85 Pa. Super. 537 25
Winslow v. Harold G. Ferguson Corp., 25 Cal. 2d 274, 277; 153 P. 2d 714 25

Authorities

	Page
Bankruptcy Act	
Sections 24 and 25	2, 29
Section 39, Title 11, Sec. 67	18
Section 47, Title 11, Sec. 75	3, 18
Civil Code of California, Section 1589	27
Code of Civil Procedure, Section 3521	28
United States Codes	
Title 28, Section 1252, sub. (3)	2
Title 28, Section 1652	3, 13, 15, 31
14 Am. Jur. Sec. 74	25

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of F. P. NEWPORT CORPORATION, LTD., et al.,

Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

This is a Petition for Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment and order of the Circuit Court affirming the decision of the Referee in Bankruptcy and reviewed by the District Court Judge denying compensation to the petitioner, who has been instrumental in bringing in more than $2,000,000 to pay off the creditors of the corporation, pay off the secured indebtedness in full with interest and to enable the sale that trebled in the balance the amount due to

unsecured creditors, and to determine if an unrevoked order made by United States District Judge Paul J. McCormick (now retired) to pay Newport compensation continued and should be put into effect.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1252, subdivision (3), U. S. Codes, and Sections 24 and 25 of the Bankruptcy Act.

The order appealed from was rendered by the United States Court of Appeals on June 6th, 1956, rehearing denied on July 6, 1956. The time for filing Petition for Certiorari was extended by Mr. Justice Douglas to October 19th, 1956.

The case proceeded in the United States Court of Appeals for the Ninth Circuit on typewritten record on the case.

OPINION BELOW

233 Fed. (2) 944

STATUTES INVOLVED

Section 1652, Title 28, as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Section 47, Bankruptcy Act, Title 11, Section 75, provides:

> "§75. Trustees: duties
>
> (a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; (2) deposit all money received by them in designated depositories; (3) account for and pay over to the estates under their control all interest received by them upon funds belonging to such estates; (4) disburse money only by check or draft on such depositories; (5) keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of; (6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; (7) examine the bankrupts (a) at the first meetings of creditors or at any other meetings specially fixed for that purpose, unless they shall already

have been fully examined by the referees, receivers, or creditors, and (b) upon the hearing of objections, if any, to their discharges, unless otherwise ordered by the court; (8) examine all proofs of claim and object to the allowance of such claims as may be improper; (9) oppose at the expense of the estates the discharges of bankrupts when they deem it advisable to do so; (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (11) pay dividends within ten days after they are declared by the referees; (12) report to the courts in writing the condition of the estates, the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; (13) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meeting of the creditors; and (14) lay before the final meetings of creditors detailed statements of the administration of the estates.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and pay the fee for such filing. He shall receive a

compensation of 50 cents for each copy so filed which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the expenses of administration. July 1, 1898, c. 541, §47, 30 Stat. 557; Feb. 5, 1903, c. 487, §10, 32 Stat. 799; June 25, 1910, c. 412, §8, 36 Stat. 840; June 22, 1938, c. 575, §1, 52 Stat. 860."

STATEMENT OF THE CASE

F. P. Newport, as President of the F. P. Newport Corporation, a large real estate corporation operating in Southern California through many years, was hit by the real estate depression in 1932. It was thrown into involuntary bankruptcy in 1935, H. F. Metcalf was appointed as Receiver by the Honorable Paul J. McCormick, the judge who handled the case through the many years. Later, Metcalf succeeded himself as trustee of the estate, when it consented to bankruptcy.

Because of its vast holding and impossibility of anyone to familiarize himself with the work and activities of the real estate involved and of its potentialities, 87.25% of the unsecured creditors signed a petition to the judge stating that since F. P. Newport was the one man really familiar with the operations of the business and could carry it on successfully, that he be employed. Judge McCormick then signed an order in which he said:

"It appearing to the Court that the assets of the said alleged bankrupt consists almost entirely of real property; that F. P. Newport, President of said alleged bankrupt corporation, has been en-

gaged in the real estate business in Los Angeles County, California, for the past twenty-five years, and that during the last fifteen years he has been engaged in the development of the property that constitutes the principal assets of said estate and that he is entirely familiar with the conditions surrounding said property and possible markets therefore:

That it was necessary for said receiver to have the services of F. P. Newport in order to sufficiently handle the operation of the aid estate

. . . . . .

And it further appearing the sum of $250.00 per month is a reasonable sum to be paid to said F. P. Newport for his services and good cause appearing therefore;"

Judge McCormick then ordered the employment of Mr. Newport at a salary of $250.00 per month,

"commencing with the 1st day of November, 1935 until the further order of this court.

Dated this 21st day of November, 1935.

/s/ Paul J. McCormick,
United States District Judge."

This order was never revoked.

Mr. Newport took up his duties under this Order per the agreement of 87.25 per cent of the unsecured creditors and the order of Judge McCormick. Later, in the proceedings involving the corporation, H. F. Metcalf, the Receiver, was qualified as trustee in bankruptcy of the estate and a Referee was designated in the case without any further consultation with Judge McCormick. Referee Utley made a second Order au-

thorizing the appointment of Mr. Newport at $250.00 per month "to continue so long as said F. P. Newport shall be employed by said trustee or until further Order of this court."

There never was any further order of the court terminating Newport's employment.

On November 26, 1943, Mr. Metcalf wrote Mr. Newport that he was short of funds and that he could consider his services terminated beginning December 1, 1943.

This writing, however, was not presented to Judge McCormick nor to Referee Utley, and was not ignored by Mr. Newport who continued working on and "employed" continuously from that date until the payment by the corporation of funds in excess of two million dollars to the Security First National Bank, the secured creditor, and the sale of assets in the sum of $407,000 in 1954 with unsecured creditors being owed only the sum of $187,000 at that time. In other words, Mr. Newport, through continuous efforts, enabled the liquidation of all of the indebtedness, secured and unsecured, 100 cents on the dollar, with surplus left over which is being sought and claimed by attorneys and in connection with administration expenses and possible interest payments.

To date the attorneys representing the estate have received $110,000; have had claims pending for $38,707 more, and will have additional claims resulting from the additional time and services being spent by it.

Mr. Newport testified that Mr. Metcalf became ill after his appointment and that he, Newport, was virtually the acting trustee; that he arranged the oil deals on the properties of the Newport Corporation; that he fought the proposal to foreclose the Newport properties by the Security Bank at a time when such foreclosure would only have brought in about $350,564.15 to the estate and caused a complete loss to the unsecured creditors; that he opposed the sale of the properties for $350,564.15 and as a result brought in an additional sum of $407,000 and that he has worked 8 hours a day, 6 days a week in behalf of the F. P. Newport Corporation for the last twenty years, including the years from 1943 until the sale of the assets. That these services were known to the trustee and accepted by the trustee, and that it accepted all of the benefits which were conferred upon the entire class of persons. The receivership of the Newport Corporation was converted into a trusteeship without any change of personality or change of judges or courts. Mr. H. F. Metcalf, who was Receiver, changed his title to Trustee, and continued on the duties as Trustee. Mr. Newport continued on his work as previously entered into and Judge Paul J. McCormick continued as the Judge in charge of the entire case. Mr. Utley was appointed a Referee in the case, and while he issued an Order continuing the employment of Mr. Newport in somewhat different language than that which Judge McCormick had made, it was a supplemental order and not one that either received the approval or disapproval of Judge McCormick, or altered the Order of Judge McCormick in any way, as to work or amount, except that it read:

"To continue so long as said F. P. Newport shall be employed by said Trustee, or until the further order of this Court."

At no time did either Judge McCormick or Referee Utley ever make an order cancelling Newport's employment. On November 26, 1943, Mr. Metcalf wrote a letter to Mr. Newport in which he said he had been studying available cash and that he did not know what to do about the possibility of payments of future salary. He said that "you may accept this as a dismissal of your services beginning December 1, 1943." Newport did not accept it as a dismissal, but continued on and the Trustee accepted his continued services.

The letter was not signed by Metcalf in his capacity as Trustee, but was a personal letter from the Metcalf Company and signed by Metcalf. No application was made to Judge McCormick to nullify his previous Order and no application was ever made to Referee Utley and, of course, there was no opportunity for a review without an order nullifying any previous orders that had been made. The Trustee and the Referee and the Court knowingly continued to accept Newport's services.

Mr. Newport continued to work from that time on until the sale of the assets in 1954. He testified that he had worked 8 hours a day for 6 days a week and that the corporation and the trustee, with full knowledge, accepted all of the benefits of all of his work and the Trustee not only conferred and co-operated with him, but, because of the illness of Mr. Metcalf a portion

of the time and his later paralysis and illness, it became necessary for Mr. Newport to do practically all of the work with his full knowledge, co-operation and consent. As the Court was frequently consulted it was also aware of Newport's activities.

As a result of Mr. Newport's efforts, the estate benefitted among other many things in the following respects: A foreclosure of the properties by the Security First National Bank on its secured loan and the wiping out of all other creditors was prevented through the opposition of Mr. Newport, and the company carried on to a point where that on January 31, 1955, it had a total income of $2,665,407.83. Out of this total income it paid to the Security First National Bank, in full with interest on its secured claim, the sum of $2,044,983.66. It paid taxes on property outside of trust in the sum of $42,384.66; it paid income tax to the Government of the United States in the sum of $59,258.38, and interest on income tax in the sum of $18,525.63. It paid that date bankruptcy fees and expenses in the sum of $197,247.35; it paid street improvement bonds in the sum of $52,155.57; it also paid trust deeds, claims and interest in the sum of $53,398.19 and other expenses, and after paying all of the expenses above listed it had on hand on January 31, 1955, cash in the sum of $73,537.27.

In 1954 the Trustee proposed to sell the assets of Newport company, on a bid of $350,000, for the same. Mr. Newport objected to this amount as being too low, and Judge McCormick sustained his position and re-

referred the matter back for further consideration and on a further bidding the remaining assets were ordered sold for $407,000.00. There was then remaining a total of unsecured claims of $187,000.00.

Although the attorneys for the estate drew down $1110,000 as attorneys' fees and had applications in for $47,000 additional fees and will have additional claims for additional fees, Mr. Newport has not received one cent since 1943.

Following the sale of the assets, the Referee ordered a 25 per cent dividend paid to the unsecured creditors. This dividend was paid. He subsequently ordered an additional dividend of 15 per cent paid, making a total of 40 per cent paid to date and he has made an order to pay 60 per cent additional dividend to the unsecured creditors, which would pay them in full.

Among the additional valuable services that Mr. Newport rendered was the arranging of oil leases on the Newport properties, and he was one of the signers of the lease in connection with these properties.

Following the sale of the assets of the F. P. Newport Corporation, Mr. Newport filed his petition for fees and compensation. These took on two categories: One of them the unpaid fees under the Orders of Judge McCormick; and second, the application for fees for services rendered to the bankrupt estate, which were accepted by the estate, and which were rendered for the benefit of the entire class of creditors, and which were rendered to the bankrupt estate.

We were of the opinion that Judge Paul J. McCormick, who had supervised the estate as the Presiding Judge for a period of many years and who could take judicial notice of many things within his own knowledge, would be the best one to interpret the Order which he himelf had made and which was never revoked and to take judicial notice of many of the things that were done during this period of years.

We made a motion before the United States Court of Appeals for the Ninth Circuit to designate Judge McCormick, who had retired, to hear and determine the petition for allowance of fees to Mr. Newport. Judge McCormick consented to be appointed and an Order was made by Judge Stephens designating Judge McCormick to hear case; however, the matter did not reach the District Court of Appeals during the period designated and when the record did reach the District Court it was noticed for immediate hearing and, in fact, in the consideration of the defective certificate of the Referee only four days took place before the matter came on for hearing and another District Judge proceeded forthwith to hear and deny Mr. Newport's claims and to affirm the Referee, denying any fees to Mr. Newport, with prejudice.

QUESTIONS PRESENTED BY THIS APPEAL

I.

Whether an Order rendered by a District Judge and the interpretation of his own order should be heard only by the jduge who made the order, if available, especially as here where the retired judge consented to hear the matter and interpret his own order, and

Should this Court in its supervisory jurisdiction over trials and proceedings remand the case to be heard by the Judge who made the order in question and whose order was nullified by another judge not familiar with his intent.

II.

Whether an order made by a District Court judge and never reversed by him continues on until it is revoked, and whether the sums due under that order are due and payable to Mr. Newport.

III.

Whether the principles of *Erie v. Tompkins,* 304 U. S. governing substantive law apply to bankruptcy proceedings so that the law of the State of California as set out in its Statutes and decisions is binding equally upon the bankruptcy court and is governed by *Erie v. Tompkins* and by Section 1652 of Title 28, Bankruptcy Act.

IV.

Whether the Trustee and the Corporation and the creditors of F. P. Newport Corporation, Ltd., having accepted the voluntary benefits of the services of F. P. Newport, which enabled more than two million dollars

to be paid off, and which will enable them to receive their claims in full are estopped to deny Newport's claim and are governed by the laws of the State of California, that he who accepts the benefits must bear the burden.

V.

Whether the Trustee is etopped to deny the compensation for the services and must pay the reasonable value of the services to Mr. Newport.

VI.

Whether the voluntary benefits accepted by the F. P. Newport estate are such that Newport should be compensated in equity for the preservation of and benefits to the entire fund under well known equitable principles.

VII.

Whether the Referee erred in refusing to receive evidence from Mr. F. P. Newport as to all of the services rendered and denying the many offers of proof made of all the services and the work performed by Mr. Newport.

VIII.

Whether the claims of Newport should have been heard by the District Court judge and not the referee.

Reasons for Granting the Writ:

(1) The Courts below have decided this case contrary to Title 28 Section 1652 U. S. Code and contrary to *Erie v. Tompkins*, 304 U. S. 64.

(2) The case raises important questions of Bankruptcy Law which require this court's plenary consideration and supervision.

(3) The Court below has decided this case contrary to equitable principles and justice.

ARGUMENT

I.

AN ORDER RENDERED BY A DISTRICT JUDGE AND THE INTERPRETATION OF HIS OWN ORDER SHOULD BE HEARD ONLY BY THE JUDGE WHO MADE THE ORDER, IF AVAILABLE. THIS COURT IN ITS SUPERVISING CAPACITY OVER APPEALS SHOULD THEREFORE REVERSE THE CAUSE. DEFENSE SUPPLY CORPORATION vs. LAWRENCE WAREHOUSE CO., 326 U. S. 631.

The Order of Judge McCormick was never set aside by Judge McCormick or any other District Court Judge, and Mr. F. P. Newport continued to render services from 1943 until the sale of the assets—all of which were received by the estate

The Order of the Court and the Contract of Employment were made by District Court Judge Paul J. McCormick and Mr. Newport had a right to rely on it,

and is entitled to the full compensation of $250.00 per month from 1943 to the date of the sale for these services, including the entry of the final judgment of sale. The word "until" as set out in the Order presupposes that *when the condition following such word* shall become operative, the precedent condition or status shall fail.

In re Wiegand, 27 Fed. Supp. 725, 729;
Faust v. Faust, 103 Cal. App. 2d 755.

As stated in *In re Wiegand,* the word means: "during the whole time before, up to the time of, (an action, occurrence, etc.), implying cessation or reversal at that time."

Therefore, until the District Court Judge issued a different order, Judge McCormick's order remained in full force and effect.

We know of no authority or power to terminate a judge's order, except by another order cancelling the same, or by an Act of Congress withdrawing jurisdiction from the court. Even where an Act of Congress ends, the judgment or order continues in effect. (See *Defense Supply Corporation v. Lawrence Warehouse Co.,* 326 U. S. 631, 93 L. Ed. 931.) None of these occurred in the instant case. The Trustee, if he desired to change Judge McCormick's Order, should have applied to Judge McCormick. There is no power granted under the Bankruptcy Act, either to the Trustee or the Referee, to change the Order of the District Judge; their powers are strictly statutory, and no power exists to change, alter, modify, or otherwise do anything with

the District Judge's order. He and he alone has that power.

Having failed to apply to the District Court for an Order terminating the former Order, the Respondent now seeks to smother it. The fact that the Receiver converted his position into a trusteeship did not change the order of the District Judge, and it did not make the District Judge's order "*functus officio*", as Respondent sought to urge. It was not the Order of Judge McCormick that became *functus officio*, but merely a conversion of the form of estate from Receivership into Trusteeship.

Nothing happened to change Judge McCormick's Order. The bankruptcy was in the same estate; it bore the same number; it dated back to the beginning of the proceeding; the same man handled the trusteeship, and Mr. Newport continued in the same duties under which the contract of employment was entered into by the District Court, and the District Court's judgment and order made employing him. Therefore, until it was set aside, Mr. Newport was entitled to his fees.

By the practice which prevails in the Federal Courts throughout the United States, a Motion to Dissolve an Order made by one judge should always be addressed to the judge who granted the order and no other judge should consent to review or change such order on the same state of facts.

Ide v. Crosby, 104 Fed. 582;
Westerly Water Works v. Town of Westerly, 77 Fed. 783, 785.

In *Klein v. Fleetford,* 35 Fed. 98, a motion granted by one District Judge was sought to be disolved by a Circuit Judge. Judge Brewer, in respect thereto, said:

> "I had occasion last term, in deciding a case, to say to counsel that as a rule injunctions issued by one judge would remain, unless modified, changed, or set aside by the same judge."

By parity of reasoning, it is respectfully urged that no other judge ought to have any say so of the order made by Judge Paul J. McCormick, except Judge McCormick, and that he ought to have had the case to be heard, or that his views regarding his order should have been secured.

There is nothing in the Bankruptcy Act, Section 47, Title 11, Sec. 75 that authorizes the Trustee to employ or terminate employment, or to review an order of the Referee. It is only the action of the Referee or the Judge that is subject to appeal.

Section 39 of the Bankruptcy Act, Title 11, Section 67, provides in section (c), as follows:

> "(c) A person aggrieved by an order of the referee may, within ten day after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforce-

ment of the order complained of may be suspended by the court upon such terms as will protect the right of all parties in interest."

The Trustee never submitted an order to the Referee or the Judge from which a review could be taken. Until this was done the orders continued in force.

II.

AN ORDER MADE BY A DISTRICT COURT JUDGE AND NEVER REVOKED CONTINUES ON UNDER ITS OWN TERMS UNTIL IT IS REVOKED. THE SUMS DUE UNDER JUDGE McCORMICK'S ORDER ARE DUE AND PAYABLE TO MR. NEWPORT.

In connection with the Order of Judge McCormick, 87.25% of the unsecured creditors had petitioned Judge McCormick to employ Mr. Newport. Not only was this an Order of Judge McCormick, but it was a contract entered into for their benefit and for the benefit of the entire estate.

In this respect, when the matter came on for hearing on Newport's Petition for Fees, no Notice was given to the unsecured creditors of the proposed hearing nor of any attempt to cancel the contract which had been made at their request and in their behalf, and to which dividends in their behalf had been made and received by them and through Mr. Newport's efforts have been made available to them. In this respect, equity will protect Mr. Newport for his efforts in their

behalf as he should properly be protected in this matter.

Central R. R. etc. Co. v. Pettus, 113 U. S. 116, 127, in which it is stated:

> "Without at all conceding that an express contract of that character would have added to the power of the court in the premises, it seems to us that the present case is embraced by the reason of the rule announced in *Trustees v. Greenough*. When the litigation was commenced, the unsecured bonds of the Montgomery and West Point Railroad Company were without any value in the financial market. That litigation resulted in their becoming worth all or nearly all that they called for. The creditors who were entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the appellee, so far as the result of litigation may, in any case, be referred to the labors of counsel. When creditors filed their claims they had notice, by the bill, that the suit was brought, not exclusively for the benefit of the complainants therein but equally for those of the same class who should come in and contribute to the expenses of the litigation. Those expense necessarily included reasonable counsel fees, which, upon every ground of justice, should be estimated with reference as well to the claims of the complainants who undertook to protect the rights of all the unsecured creditors, as of the claims of those who accepted the fruits of the labor of complainants and their solicitors. We are of the opinion that the appellees are entitled to reasonable compensation for their pro-

fessional services in establishing a lien, in behalf of the unsecured creditors of the Montgomery and West Point Railroad Company, upon the property described in the suit instituted by Branch, Sons & Co. and others; and that such compensation should be made with reference to the amount of all claims filed in the cause, although the evidence thereof may have been retained in the custody of the respective creditors; excepting from such estimate or calculation not only the claims of the complainants named in the bill, and of other unsecured creditors who may have had special contracts with appellees, or settled with them, but also such claims purchased by appellants as were not filed for allowance under the decree."

See also:

Trustees Internal Improvement Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157;

Sprague v. Ticonic National Bank, 307 U. S. 161, 83 L. Ed. 1184.

III.

THE VOLUNTARY BENEFITS ACCEPTED BY THE F. P. NEWPORT ESTATE ARE SUCH THAT NEWPORT SHOULD BE COMPENSATED IN EQUITY FOR THE PRESERVATION AND BENEFITS TO THE ENTIRE FUND UNDER WELL KNOWN EQUITABLE PRINCIPLES.

Mr. Newport is entitled further to extraordinary fees for services rendered in preserving the whole estate.

In addition to the fee which Mr. Newport asked under the Order of Judge McCormick at the rate of $250.00 per month, Mr. Newport, by way of testimony and offer of proof, showed that he had rendered many other services in obtaining oil contracts and in improving and preserving the property, and in obtaining assets for the estate which had exceeded well over two million dollars. Had he not taken steps and conducted the activities which he did, *none of the unsecured creditors* (87.25 per cent of whom signed to have him employed) *would have received their compensation.* The Security-First National Bank, which was a secured creditor, would not have been paid in full, and the unsecured creditors would not have been in a position to receive the funds they are about to receive.

In *Vangel v. Vangel,* 45 A.C. No. 24, page 828, which involved the dissolution of a partnership, one of the partners quarreled with the other partners and was expelled from the partnership for cause, and by judi-

cial decree, and after he had been expelled he continued to participate with his former partners in the operation and management of the business. He contended that he was entitled to receive compensation for services so performed. In reply, his brothers stated that his services were "after dissolution" and were voluntary and against their wishes. However, the Supreme Court of California held that they acquiesced fully in continuing his services and that he was therefore entitled to compensation—so here too. In this case the Supreme Court of California said:

> "The balance of the equities favors the allowance of compensation based upon services rendered." (45 A.C. 834).

The Supreme Court of California further said:

> "The type of operation here shown is one which involves a considerable amount of service and skill in the cultivation and harvesting of a citrus crop. Furthermore, it would be inequitable to deny Charles compensation for his services where his brothers acquiesced in them." (45 A.C. 834).

We are in a much stronger position as far as Mr. Newport is concerned. The operations of the Newport Corporation required the services and skill in the work that was done and it is a fact, which was known to Judge McCormick and to the Referee and others, that Mr. Metcalf was ill a substantial portion of his trusteeship. The work that was done by Mr. Newport required skill (as shown by the petition for his employment) and that he rendered that skill and service is shown by the

results achieved—more than two and a half million dollars realized from an estate that was totally bankrupt and would have been foreclosed for a sum in the neighborhood of $350,000 except for the intervention of Mr. Newport.

It would be inequitable to deny him compensation, just as in the *Vangel* case.

In the *Vangel* case, there was no order of a judge; but in the instant case Judge McCormick and 87.25% of the unsecured creditors fully authorized Mr. Newport's employment and authorized the compensation for him. Neither the judge nor the creditors benefitting from it revoked their order or agreement, and it would be inequitable to deny him compensation, both under the orders of Judge McCormick and under equitable principles, where the estate had received the full benefits of all of Mr. Newport's work, which they accepted to 1954.

In *Dodd v. Stellar*, 30 Cal. 2d 506, and particularly at pages 509 and 510, various cases are cited which set forth that:

> "It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them."

See: *Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 277; 153 P. 2d 714; 14 Am. Jur. §74; *Trustees of Int. Imp. Fund v. Greenough*, 105 U. S. 527; *Estate of Marre*, 18 Cal. 2d 191; *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161; *Scott v. Superior Court*, 208 Cal. 303; *Central Railroad & Banking Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Colley v. Wolcott*, 187 F. 595; *Muskegon Boiler Workers v. Tennessee Valley I. & R. Co.*, 274 F. 836.

See, also: *Hardware Mut. Casualty Co. v. Butler*, 116 Mont. 73, 148 P. 2d 563; *Ellis v. Atlantic Refining Co.*, 308 Pa. 287; 163 A. 531, 83 A.L.R. 936; *Appeal of Harris*, 323 Pa. 124, 186 A. 92, 96; *Wilson v. Pittsburgh B. & I.*, 85 Pa. Super. 537.

And see *R. E. Spriggs Inc. v. Industrial Accident Commission*, 42 Cal. 2d 785, particularly page 793, reviewing other California cases and affirming the principle we have enunciated.

The Supreme Court of California has said, in the *Spriggs* case, quoting from *Estate of Marre*, 18 Cal. 2d 191:

> "Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service an equitable lien against the funds so preserved." (citing cases). (42 Cal. 2d 794).

In *Vaught v. Charleston National Bank*, 62 Fed. 2d 817, at 820, the court said:

"But these salutary and settled principles do not prescribe the employment of an officer for tasks other than those imposed upon him by his office. The rule is accordingly well settled that where an officer of a corporation, at the request or with the acquiecence of other authorized officers, renders services clearly outside of his ordinary official duties, under circumstances which raise a presumption that the parties should have understood that they were to be paid for, he may recover reasonable compensation therefor. *Fitzgerald Const. Co. v. Fitzgerald,* 137 U. S. 98, 111., 11 S. Ct. 36, 34 L. Ed. 608; *Corrine Mill, Canal & Stock Co. v. Toponce,* 152 U. S. 405, 14 S. Ct. 632, 38 L. Ed. 493; *National Loan & Investment Co. v. Rockland Co.* (C.C.A. 8) 94 F. 335; *Montana Tonopah Mining Co. v. Dunlap* (C.C.A. 9) 292 F. 19, 23; *Tietsort v. Irwin* (C.C.A. 6), 9 F. (2d) 65; *Church v. Harnit* (C.C.A. 6) 35 F. 2d 499, certiorari denied 281 U. S. 732, 50 S. Ct. 247, 74 L. Ed. 1148; *Crown Central Petroleum Corp. v. Bates* (C.C.A. 5) 37 F. (2d) 508, certiorari denied 281 U. S. 743, 50 S. Ct. 348, 74 L. Ed. 1156; *Pew v. First Nat. Bank,* 130 Mass. 391, 395; Wilgus, *Cases on Private Corporations,* p. 1757; *Thompson on Corporations,* (2d Ed.) ch. 66, §§1825-1829; Subject note, L.R.A. 1917 F. 319. In the *Fitzgerald* case, *supra,* it was held that it was outside of the official duties proper of the treasurer of a private corporation to go to expense and trouble to procure finances for the company."

And, particularly, see *Fitzgerald Construction Co. v. Fitzgerald,* 137 U. S. 98, 34 L. Ed. 608.

Mr. Newport is entitled to all of the monies unpaid under the order of Judge McCormick and to all the unpaid extraordinary fees. The attorneys for the estate have, to date, been paid almost $200,000.00. All of these funds were preserved for the estate and attorneys and creditors by Mr. Newport. His claim should be allowed in full.

In *Corrine Mill, Canal & Stock Co. v. Toponce,* 152 U. S. 495, 38 L. Ed. 493, at 498, the Supreme Court of the United States held that a general manager of a corporation may recover for his services where they were rendered under such circumtances as raises an implied promise to pay for them on the part of the corporation.

The Trustee accepted the services of F. P. Newport over a period of years and there should be reimbursement.

Re Lustron Corporation, 196 Fed. 2d 975;
Chapin v. Collard, 189 P. 2d 642;
Sprague v. Tyconic National Bank, 307 U. S. 161.

Erie v. Tompkins, applying the law of the State of California, is equally applicable in bankruptcy proceedings. Under that situation, Section 1589 of the Civil Code of California provides as follows:

"§1589. Acceptance of Benefits Assumes Burdens.—A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

This section was binding; also Section 3521 of the Code of Civil Procedure reading:

> "He who takes the benefit must bear the burden."

The burden is the salary of Mr. Newport, plus fees for extraordinary service. His services brought funds to the entire estate. The attorneys' fees depleted it. It would be inequitable to deny him compensation for these benefits which they accepted.

IV.

THE REFEREE ERRED IN REFUSING TO RECEIVE EVIDENCE FROM MR. NEWPORT AND DENYING THE OFFERS OF PROOF MADE OF ALL OF THE SERVICES AND WORK PERFORMED BY MR. NEWPORT.

At the time of the hearing before the Referee, the attorney for the Trustee, after a few minutes of hearing, made a motion to dismiss the petition and objected to the introduction of evidence. The objection was sustained and thereafter all of the testimony, letters, documents and exhibits were introduced by way of offer of proof. The Referee's decision was therefore not based upon petitioner's evidence—nearly all of which he rejected. None of it was rebutted or contradicted.

It was therefore highly prejudicial error to reject this evidence and base a decision of dismissal without its consideration. The attitude of the Referee can be seen in his attempt to pick on the fact that the petition

for review was filed in the District Court Clerk's office (authorized by Bankruptcy Rule, General Order 20) rather than with him as grounds for dismissing the petition as not timely—any straw in the wind.

Since this is an equity case, this Court has as much right under the Bankruptcy Act (Sec. 24) to hear and determine the law and facts as the District Court. We therefore ask this Court to consider all the evidence offered as *offer of proof*. We are willing to have a reference to take the testimony of Judge McCormick to interpret his own order.

The Circuit Court of Appeals erroneously construed *Imperial Assurance Company v. Livingston*, (8th Cir.), 49 Fed. 2d 745; 74 A.L.R. 1336. This case holds that everything that is done by a Trustee must be approved by the Court, and that the Trustee should frequently refer matters to the Court for its determination and approval. This case helps, rather than hurts us.

In the Newport matters, the Trustee never did seek the approval of the court to terminate Newport's employment. Having failed to do so, he now seeks to have the court do what should have been done, had he desired to terminate the court's order and the employment of Newport on behalf of the creditors who had petitioned the court. His letter to Newport was not even signed as "Trustee", it was an individual matter resulting from a then shortage of funds. Newport had a right to rely on the orders of the Judge and the continued acceptance of his services by the Trustee and the Corporation which needed them badly. Had there been

a Judge's or Referee's order terminating his employment, he could have sought a review; but since the action was unofficial, and not approved by the judge, the employment necessarily continued and he had a right to rely on it.

The principle of "estoppel" is an equitable principle that prevails. A big estate benefitted, and the creditors all benefitted. Estoppel may exist even against a public body when they cause one to change his position to his detriment. (*Los Angeles Times Mirror Co. v. Superior Court,* 3 Cal. 2d 309). If the law of the State of California applies through *Erie R. Company v. Tompkins,* 304 U. S. 64, the Trustee is estoppel, and the estate, which benefited, is estopped.

The Court of Appeals concedes that Newport's actions involve no fraud. Therefore, the legal principles set forth in *Freeman Coal Mining Co. v. Burton,* 388 Ill. 604, 58 N.E. (2d) 589, certiorari denied, 325 U. S. 859, could have no application, as that case was based entirely on fraud.

Here Newport's conduct was extremely beneficial to the corporation to the extent of paying off more than $2,000,000 in secured indebtedness (in full with interest) and having sold the balance of its assets for $407,000.00, with unsecured claims amounting to $187,000.00.

We submit that the Court of Appeals has decided this case contrary to fundamental principles and this case involves important questions of Bankruptcy Law

that require the plenary consideration of this Honorable Court and a reversal of the holding of the court below that the principles of *Erie R. Co. v. Tompkins,* 304 U. S. 64, and Title 28 Section 1652 do not apply in bankruptcy.

We respectfully pray for reversal of the judgment below—for an order to pay Mr. Newport the unpaid salary from 1943 and for the payment of extraordinary fees to Mr. Newport for services rendered in preserving the common fund and enhancing it to more than $2,500,000, and a sale of the balance of the assets for $407,000.00.

Repectfully submitted,

MORRIS LAVINE
Attorney for Appellant.